

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KIM E. BRUNDIGE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>INTEGRATED SOLUTIONS GROUP</b>	)	
Respondent	)	Docket No. 1,024,260
	)	
AND	)	
	)	
<b>COLUMBIA NATIONAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the December 14, 2005 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant has failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent.

Claimant argues that evidence elicited from claimant's supervisor, a coworker and Dr. Eustaquio Abay, II, shows that claimant's injury was directly related to a strain occurring at work and, accordingly, his claim should be found compensable.

Respondent argues that the evidence in the record shows that claimant was merely sitting in a chair when he claims to have injured his low back. Respondent contends that this activity constitutes "normal activities of day-to-day living"<sup>1</sup> and that his preexisting condition constituted a personal risk.<sup>2</sup> Therefore, claimant has failed to meet his burden of proof in establishing personal injury arising out of his employment.

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<sup>1</sup>K.S.A. 44-508(e).

<sup>2</sup>*Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This case has previously been before the Board on the issue of whether claimant's injury arose out of his employment with respondent. The ALJ had entered an Order on August 24, 2005, finding that claimant failed to sustain his burden of proof of injury by accident arising out of his employment with respondent. Claimant appealed that Order to the Board, which affirmed the ALJ in its Order dated October 11, 2005.

Claimant then took the depositions of his supervisor, Phillip L. Miller, Jr., and a coworker, Thomas J. Ouellette. He also took the deposition of Dr. Abay. Accordingly, this preliminary hearing record contains these additional witnesses' testimony, as well as the claimant's testimony at the original August 24, 2005 preliminary hearing before Judge Moore and claimant's August 23, 2005 deposition. Claimant did not testify at the December 8, 2005 preliminary hearing, nor did any other witness. That transcript contains only statements of the court and counsel. However, the transcript of claimant's deposition testimony was not available and, thus, was not considered by the ALJ or by the Board when their original preliminary hearing orders were entered.

Both Mr. Miller and Mr. Ouellette testified that claimant had a defective chair. However, neither of them had any direct knowledge of how claimant injured his back. Mr. Miller testified that it was his understanding that claimant's injuries occurred when the chair he was sitting in adjusted itself on its own, without claimant trying to adjust the chair, and caused further injury to claimant's back. Mr. Miller did not recall getting this information from claimant or anyone who witnessed the event, but it was just his understanding of what happened. Mr. Ouellette testified that claimant might have told him he had turned in his chair and something popped in his back, although all he could recall for sure was that claimant told him he was sitting in his chair and something just popped in his back.

The Board's Order in this case dated October 11, 2005, states:

Here, although the claimant complained of a "defective" chair, it does not appear that there is anything about the chair or its purported "defect" that caused the "pop" and claimant's immediate onset of pain in his low back that radiated into his leg. Like the ALJ, the Board believes claimant has failed to establish that the chair has any connection to his injury.

Dr. Abay, claimant's treating physician, testified that claimant related that he was at work sitting in a chair when suddenly he felt a pop and immediately had pain in the low back. Although nothing in Dr. Abay's records indicated that claimant was bending forward typing or twisting to one side when he felt the pop, the records of Dr. Larry Burnett, who

referred claimant to Dr. Abay, contain a history where claimant thinks he “may have rotated or reached to pick something up.”<sup>3</sup> He was also read portions of claimant’s preliminary hearing testimony. Dr. Abay testified that claimant had an underlying degenerative disc problem before April 19, 2005, and that something on that date precipitated an axial load to the spine that produced a disc herniation. He further testified: “Assuming that all the claim is correct and nothing else strenuous is true, then there is, in fact, a direct correlation to the event of . . . April 19 and the onset of his symptoms . . . .”<sup>4</sup> When asked if a patient could have a spontaneous onset of a herniated disc, he testified: “I think a spontaneous herniated disc with no apparent trauma is probably more an overlooked cause than a true spontaneous herniation.”<sup>5</sup>

In his Order dated December 14, 2005, the ALJ stated:

Claimant has now adduced the testimony of Dr. Abay, who attributes Claimant’s injury to leaning forward and twisting at the time he felt the “pop.” Unfortunately, Claimant did not testify he was leaning forward and/or twisting at the time he felt the “pop.” He was simply sitting in a chair. The additional evidence presented, including the testimony of the two co-workers, fails to add anything significant to the evidentiary record. Claimant’s evidence still fails to establish that his injury “arose out of” his employment with Respondent.

However, claimant did describe rotating or reaching to Dr. Burnett, and likewise described leaning forward or twisting at the time he felt the “pop.” The first time claimant testified about his mechanism of injury was during a deposition taken by respondent on August 23, 2005.

Q. Tell me how you injured yourself April 19th of 2005.

A. I was sitting at my desk, normal morning routine, typing up notes, turned or twisted in the chair, felt a hard pop, followed by pain.<sup>6</sup>

At the preliminary hearing conducted the following day, claimant was less certain about twisting but also testified that if he was typing on his keyboard then he would have been leaning forward in his chair.

Q. Some of the medical records that have been offered today reflect that you were twisting when you felt the pop?

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<sup>3</sup>P.H. Trans. (Aug. 24, 2005), Cl. Ex. 1 at 10; Brundige Depo. at 50.

<sup>4</sup>Abay Depo. at 10.

<sup>5</sup>*Id.* at 17.

<sup>6</sup>Brundige Depo. at 24-25.

A. Very well could be.

Q. Do you have any recollection of the specific action you were doing at the time of injury?

A. I know I was typing immediately beforehand. I could have turned to answer a technician's question, pick something up. I cannot recall exactly.<sup>7</sup>

Q. As you were typing, would you be—when you normally type, do you have to lean over?

A. Yes.

Q. So you'd be in a slightly bent position?

A. Yes.

Q. Do you believe you were slightly bent forward to type when you felt this pop in your back?

A. Yes.<sup>8</sup>

Mr. Miller agreed that claimant would lean forward slightly when he typed.<sup>9</sup> Also, Mr. Ouellette believed claimant told him on April 19, 2005, that he felt the pop in his back as he was turning in his chair.

Q. Sir, you do have a recollection that Mr. Brundige told you that the mechanism of injury was that he was turning in the chair?

A. The mechanism of injury? I wouldn't know if that's exactly—I believe he said he turned in his chair, he felt his back pop, that's all I remember as far as any type of reference to motion in the chair.<sup>10</sup>

The addition of Dr. Abay's testimony to the preliminary record presents an expert medical opinion relating claimant's aggravation of his preexisting low back condition to the April 19, 2005 incident at work. This causation opinion is based upon facts that follow claimant's description of the accident and mechanism of injury. Accordingly, the Board

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<sup>7</sup>P.H. Trans. (Aug. 24, 2005) at 16.

<sup>8</sup>*Id.* at 36.

<sup>9</sup>Miller Depo. at 30.

<sup>10</sup>Ouellette Depo. at 14.

now finds claimant has met his burden of proving personal injury by accident arising out of his employment with respondent.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated December 14, 2005, should be and is hereby reversed, and this matter is remanded to the ALJ for further orders consistent herewith on claimant's request for preliminary benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2006.

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant  
Scott J. Mann, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director